

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: April 11, 2006

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF HOMELAND
SECURITY, CUSTOMS AND BORDER
PROTECTION, WASHINGTON, D.C.

Respondent

and

Case No. WA-CA-05-0340

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, COUNCIL 117, AFL-CIO

Charging Party

Pursuant to section 2423.27(c) of the Final Rules and Regulations, 5 C.F.R. § 2423.27(c), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed is a Motion for Summary Judgment and other supporting documents filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF HOMELAND SECURITY, CUSTOMS AND BORDER PROTECTION, WASHINGTON, D.C. Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 117, AFL-CIO Charging Party	Case No. WA-CA-05-0340

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been submitted to the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **MAY 15, 2006**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

PAUL B. LANG
Administrative Law Judge

Dated: April 11, 2006
Washington, DC

OALJ 06-10

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. DEPARTMENT OF HOMELAND SECURITY, CUSTOMS AND BORDER PROTECTION, WASHINGTON, D.C. Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 117, AFL-CIO Charging Party	Case No. WA-CA-05-0340

Tresa A. Rice
For the General Counsel

Before: PAUL B. LANG
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

Statement of the Case

On February 16, 2006, the Regional Director of the Denver Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that the U.S. Department of Homeland Security, Customs and Border Protection, Washington, D.C. (Respondent) failed to comply with § 7114(b)(4) of the Federal Service Labor-Management Relations Statute (Statute) and that the Respondent committed an unfair labor practice in violation of § 7116(a)(1), (5) and (8) of the Statute. The Complaint included a notice that the Respondent was required to file an answer no later than March 13, 2006, that an answer filed by mail must be postmarked as of that date and that, if no postmark date is evident on the mailing, the answer would be assumed to have been mailed 5 days prior to receipt. It further stated that, absent a showing of good cause to the contrary, a failure to file an answer or to respond to any allegation would constitute an admission of that allegation.

On March 31, 2006, the General Counsel filed a motion for summary judgment pursuant to § 2423.27 of the Authority's Rules and Regulations (Rules and Regulations) along with a supporting brief and exhibits.¹ The motion was also accompanied by a certificate of service showing that it

¹

The case was transferred to the Washington Region of the Authority on February 22, 2006.

had been served on the Respondent by facsimile transmission on the same date.

The hearing was indefinitely postponed by Order of April 3, 2006. As of this date the Respondent has not filed an answer to the Complaint, a response to the motion for summary judgment or a motion for an extension of time in accordance with § 2423.21 of the Rules and Regulations.

Discussion and Analysis

Procedural Standards

Parties appearing before the Authority are charged with knowledge of all pertinent statutory and regulatory filing requirements, *U.S. Environmental Protection Agency, Environmental Research Laboratory, Narragansett, Rhode Island*, 49 FLRA 33, 37 (1994). Section 2423.20(b) of the Rules and Regulations requires that the Respondent file and serve its answer to the complaint within 20 days of the date of service of the complaint, but, in any event, prior to the start of the hearing. Section 2423.27(b) of the Rules and Regulations requires responses to motions for summary judgment to be filed within five (5) days after the date of service of the motion.²

Standards for Summary Judgment

In considering motions for summary judgment submitted pursuant to § 2423.27 of the Rules and Regulations the standards to be applied are those used by United States District Courts under Rule 56 of the Federal Rules of Civil Procedure, *Department of Veterans Affairs, Veterans Affairs Medical Center, Nashville, Tennessee*, 50 FLRA 220, 222 (1995). Rule 56(c) provides, in pertinent part, that:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

2

According to § 2429.21 of the Rules and Regulations when the period of time allowed for the filing of papers is 7 days or less, intermediate Saturdays, Sundays and legal holidays are to be excluded from the computation. Therefore, the Respondent's response to the General Counsel's motion was to have been filed by April 7, 2006.

Upon review of the General Counsel's motion I have determined that the summary judgment process is appropriate in this case.

Findings of Fact

Since the Respondent has not filed an answer to the Complaint, it is deemed to have admitted its allegations. Therefore, pursuant to § 2423.20(b) of the Rules and Regulations, I will adopt the following factual and legal allegations of the Complaint:

1. This unfair labor practice complaint and notice of hearing is issued under 5 U.S.C. §§ 7101-7135 and 5 C.F.R. Chapter XIV.

2. The U.S. Department of Homeland Security, Customs and Border Protection (Respondent) is an agency under 5 U.S.C. § 7103(a)(3).

3. The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization under 5 U.S.C. § 7103(a)(4), and is the exclusive representative of a unit of employees appropriate for collective bargaining with the Respondent.

4. The American Federation of Government Employees, Council 117 (the Charging Party) is the agent of the exclusive representative at the Respondent.

5. The charge in Case No. WA-CA-05-0340 was filed by the Charging Party with the Washington Regional Director on April 29, 2005.

6. A copy of the charge described in paragraph 5 was served on the Respondent.

7. During the time period covered by this complaint, these persons occupied the position opposite their names:

Sheila Brown	Director, Labor Relations
Robert Bonner	Commissioner

8. During the time period covered by this complaint, the persons named in paragraph 7 were supervisors or management officials under 5 U.S.C. § 7103(a)(10) and (11), and/or agents of the Respondent.

9. During the time period covered by this complaint, the persons named in paragraph 7 were acting on behalf of the Respondent.

10. On or about November 9, 2004, the Charging Party, by Charles Showalter, President, and Bridgette Rodriguez, Fair Practices Coordinator, requested that the Respondent furnish certain information concerning transfer requests made by employees in the bargaining unit described in paragraph 3.

11. On or about April 13, 2005, the Charging Party, by Bridgette Rodriguez, Fair Practice Coordinator, submitted an additional request to Respondent for the information described in paragraph 10.

12. Since November 9, 2004, the Respondent has failed and refused to respond to the request for information described in paragraphs 10 and 11.

13. By the conduct described in paragraphs 10 through 12, the Respondent refused to comply with 5 U.S.C. § 7114(b) (4).

14. By the conduct described in paragraphs 12 and 13, the Respondent committed an unfair labor practice in violation of 5 U.S.C. § 7116(a) (1), (5) and (8).

In addition, the following findings of fact are derived from the attachments³ to the General Counsel's brief:⁴

15. By letter of November 9, 2004, from Charles Showalter, the President of the Union, to Commissioner Bonner, to the attention of Sheila Brown, Respondent's Director of Labor and Employee Relations (Att. 5) the Union submitted the following information request to the Respondent with the proviso that the documents could be sanitized to ensure compliance with the Privacy Act:

(1) True and complete copies of any Department of Homeland Security (DHS) and/or Customs and Border Protection (CBP) documents that evince or in any way show:

3

The attachments will be cited as "Att." along with the attachment number.

4

Each of the attachments to the General Counsel's brief have been authenticated by the affidavit of Bridget Rodriguez, the Fair Practices Coordinator of the Union (Att. 8).

(A) As to transfer requests submitted by any and all CBP Officers on/after June 1, 2004 and/or pending with the agency on June 1, 2004:

(i) the Race(s), Nationality(ies) and/or Age(s) of the requesting CBP Officer(s), as known;

(ii) By Race, Nationality and/or Age, as known, the type of transfer request submitted and the current status of that type transfer request (i.e.: approved, denied, pending...);

(iii) As to (ii) above, as a follow-up, provide documents that show how many denied and pending transfer requests, by type, were submitted by legacy INS CBP Officers (who fall within the Council 117 bargaining unit).

PARTICULARIZED NEED:

The National INS Council 117 (changing its name to the National Homeland Security Council 117) has been and is the exclusive bargaining representative, nationally and regionally, for all legacy INS bargaining unit employees within the DHS, CBP, ICE and CIS, including (legacy INS) CBP Officers. As you are aware, the Council is responsible for representing the interests and protecting the interests of our bargaining unit as it relates to their working conditions, conditions of employment, our CBA [presumably collective bargaining agreement], Equal Employment Opportunity, and prohibited personnel practices. This is also affirmed both through law, past practice and our USINS and NINSC Agreements (CBA 2000, 1997, 1994 and prior).

The Council requires the information requested in item (1) (on pages one (1) and two (2)) in order to determine whether the current CBP policies and practices applied to CBP Officer transfer requests are having an adverse impact and/or a discriminatory impact (by Race, Nationality and/or Age) on those CBP Officers we represent (legacy INS).

The Council does not possess, nor does it have domain over, the information requested above. Further, the failure of the department and/or the agency to provide this information will meaningfully obstruct the Council from fulfilling our obligations under law, regulation, past practice and our CBA to represent and protect the interests of the bargaining unit as it relates to working conditions, conditions of employment, Equal Employment Opportunity, and prohibited personnel practices.

16. On April 13 and 15 2005, Rodriguez sent a number of e-mail messages to Brown and others in an unsuccessful attempt to obtain the requested information (Att. 7).

17. Although Brown told Rodriguez that she would have her staff look into the Union's information request, the Union received no further communications from the Respondent. Specifically, the Respondent has neither furnished the information nor indicated why it would not do so (Att. 8, ¶3).

Discussion and Analysis

Pursuant to § 7114(b)(4) of the Statute, the duty of an agency to negotiate in good faith includes the obligation to furnish the certified representative of its employees with requested information which the representative needs to fulfill its duty to members of the bargaining unit. In order for the representative to invoke its statutory right to information it must establish a particularized need by articulating, with specificity, why it needs the information, including the uses to which it will put the information and the connection between those uses and its representational responsibilities under the Statute. Responsibility for articulation requires more than a conclusory statement so as to permit the agency to make a reasoned judgment as to its obligations regarding disclosure. The agency is responsible for establishing countervailing anti-disclosure interests, if any, and must do so in a nonconclusory fashion, *Internal Revenue Service, Washington, D.C. et al.*, 50 FLRA 661, 669 (1995) (*IRS*). If

the agency has grounds for nondisclosure⁵ it must articulate them in response to the information request and not for the first time at a hearing or at some other phase of an unfair labor practice proceeding, *Federal Aviation Administration*, 55 FLRA 254, 260 (1999).

In articulating its statement of particularized need, the Union was not required to describe the nature of the Respondent's alleged misapplication or violation of policy, procedure, law or regulation. Indeed, it was not necessary for the Union even to have believed that the Respondent had acted improperly, *Health Care Financing Administration*, 56 FLRA 156, 159, 162 (2000). Showalter's letter of November 9, 2004, left room for no legitimate doubt that the information was necessary for the Union to determine whether there was any indication that transfer requests by bargaining unit employees were being handled in a discriminatory manner. Therefore, the Union's statement of particularized need was specific enough to allow the Respondent to determine its obligation to provide the requested information in accordance with the holding in *IRS*.

For the foregoing reasons, I have concluded that the Respondent violated § 7114(b)(4) of the Statute by failing either to provide the Union with the requested information or to articulate reasons for its failure to disclose the information. I have also concluded that the Respondent committed an unfair labor practice in violation of § 7116(a)(1), (5) and (8) of the Statute. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the U.S. Department of Homeland Security, Customs and Border Protection, Washington, D.C. (Respondent) shall:

1. Cease and desist from:

5

According to § 7114(b)(4) of the Statute, legitimate grounds for nondisclosure would be that disclosure is prohibited by law, that the information is not normally maintained by the agency in the regular course of business, that it is not reasonably available and/or necessary for the union to perform its representational function or that the information constitutes guidance, advice, counsel or training to managers or officials with regard to collective bargaining.

(a) Failing and refusing to reply to information requests from the American Federation of Government Employees, Council 117 (Union) that are necessary for a full and proper discussion, understanding and negotiation within the scope of collective bargaining.

(b) Failing and refusing to provide the information requested by the Union on November 9, 2004, in a timely manner.

(c) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Reply to information requests from the American Federation of Government Employees, Council 117 (Union) that are necessary for a full and proper discussion, understanding and negotiation within the scope of collective bargaining.

(b) Provide the information requested by the Union on November 9, 2004, in a timely manner.

(c) Post at the facilities of the U.S. Department of Homeland Security, Customs and Border Protection, Washington, D.C., copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commissioner of Customs and Border Protection, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Washington Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, April 11, 2006.

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PAUL B. LANG
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of Homeland Security, Customs and Border Protection, Washington, D.C., violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to reply to information requests from the American Federation of Government Employees, Council 117 (Union) that are necessary for a full and proper discussion, understanding and negotiation within the scope of collective bargaining.

WE WILL NOT fail and refuse to provide the information requested by the Union on November 9, 2004, in a timely manner.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL reply to information requests from the American Federation of Government Employees, Council 117 (Union) that are necessary for a full and proper discussion, understanding and negotiation within the scope of collective bargaining.

WE WILL provide the information requested by the Union on November 9, 2004, in a timely manner.

(Activity)

Date:

By:

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate

directly with the Regional Director, Washington Regional Office, Federal Labor Relations Authority, whose address is: 1400 K Street, NW, 2nd Floor, Washington, DC 20424-0001, and whose telephone number is: 202-357-6029.

